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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH EMILE SISSLER

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STUART R. SHAFER (P-25599)
REID AND REID
One Business & Trade Center
200 Washington Square, North
Lansing, Michigan 48933-1384
(517) 487-6566
Attorneys for Defendant-
Petitioner

QUESTIONS PRESENTED

1. Whether a defendant has a Sixth Amendment right at a pretrial suppression hearing where the essential witnesses are police officers who refuse to testify after exercising their Fifth Amendment rights, and, if so, whether such a conflict should be resolved in favor of the defendant because of the inherent danger of substantial prejudice.

2. Whether an "anticipatory" search warrant is valid where the contraband was not on a sure course to its destination and where the warrant was based not on probable cause, but on numerous contingencies outside the control of the police.

3. Whether a defendant's challenge to a search is limited to only those items in which (s)he has a property or possessory interest where the police flagrantly disregarded the limiting terms of the search warrant and seized items far outside the scope of the warrant and where the prevailing law is that

even evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant exhibit "flagrant disregard" for its terms.

4. Whether a defendant's Fifth Amendment rights are violated where (s)he is interrogated within view of his/her attorney, a "co-suspect," who, unbeknownst to defendant, was intentionally not advised of his Miranda rights and denied his repeated requests to call an attorney, and where defendant made an equivocal request for an attorney.

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JOSEPH EMILE SISSLER

Petitioner,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PRAYER

The Petitioner, Joseph Emile Sissler, Defendant-Appellant in the Court below, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming the Decision of the United States District Court for the Western District of Michigan, Southern Division was entered on June 10, 1992 in an unreported decision and is reproduced hereto as App. A. The District Court's June 8, 1990 Opinion is reproduced hereto as App. B. The District Court's August 30, 1991 Opinion is reproduced hereto as App. C.

CONSTITUTION

U. S. Const., Amend IV:

> **Searches and Seizures**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend V:

> **Capital Crimes; double jeopardy; self-incrimination; due process; just compensation for property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend VI:

Jury trial for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

28 U.S.C. Sec. 1254(1):

"Cases in the courts of appeals may be

reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decrees."

PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the names of all parties.

JURISDICTION

The Opinion of the United States Court of Appeals for the sixth Circuit was filed on August 6, 1991. Upon the motion of Petitioner, this Court granted an extension of time for filing until November 7, 1992. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Introduction

On January 16, 1990, Petitioner, Joseph Emile Sissler, Defendant-Appellant below, ("Sissler"), was an overnight guest at the Okemos, Michigan home of Robert L. Baldori and his girlfriend, Kelly S. Boyle. Shortly after

midnight, two dozen local and federal law enforcement officers burst through the door to execute a federal "anticipatory" search warrant of the premises.

This search warrant and its execution has led, inter alia, to the issuance of criminal charges against two of the police officers, including the chief evidence officer, for wilfully exceeding the terms of the search warrant by removing (stealing) property from the premises. It has been established that the police intentionally seized property far beyond the limiting terms of the search warrant, including, inter alia, $1,030 in Canadian currency, computer printers, modems, and disk drives, a fax machine, records, and three dozen private and intimate (nude) color slides and several nude photographs of Ms. Boyle, which were stolen by the police and later passed around to other people and used in a "stag slide show" at the police station. It has also been established that the Asset

Seizure Unit, comprised of local police assigned to a tri-county narcotics unit, "piggy-backed" this federal search warrant and intentionally seized property outside the scope of the search warrant.

At the heart of this appeal, and the numerous and serious constitutional issues it raises, is whether evidence seized by the police, during this embarrassing and documented display of intentional and flagrant misconduct can be used by the government to against Sissler.

The Proceedings Below

On January 16, 1990, a criminal complaint was filed against Sissler. On January 24, 1990, the complaint was dismissed and a two-count indictment was filed in its stead charging Sissler with Attempt Possession with the Intent to Distribute Marijuana and Interstate Travel in Aid of Racketeering. (App. D).

On June 8, 1990, the district court

denied Sissler's Motions to Quash the Search Warrant and to Suppress Defendant's Statements. (App. B). On June 12, 1990, pursuant to a plea bargain, Sissler entered a conditional plea of guilty, thereby preserving his right to appeal the denial of his pretrial motions. F.R. Crim. P. 11(a)(2). (App. E). On September 21, 1990, the district court granted Defendant's Motion to Reopen Proofs and for a Rehearing on the basis of newly discovered evidence relating to police misconduct in the execution of the search warrant. (App. F). On August 30, 1991, following the reopened suppression hearing, the court below denied Defendant's renewed Motion to Suppress. (App. C). On September 23, 1991, Sissler was sentenced to 57 months in prison. (App. G). On October 7, 1991, the district court granted Defendant's Motion for Release Pending Appeal. (App H). On June 10, 1992, the United States Sixth Circuit Court of Appeals filed its Opinion denying Sissler's

appeal. (App. A). On October 14, 1992, the district court ordered that Sissler appear to begin serving his sentence on October 23, 1992. (App. I).

STATEMENT OF FACTS

On January 16, 1991 at 12:15 a.m., two dozen law enforcement officials, including members of the Tri-County Metro Narcotics Squad ("Metro"), Ingham County Prosecutor's Asset Seizure Unit, Federal Bureau of Investigation ("FBI"), Internal Revenue Service ("IRS"), and Western Michigan Enforcement Team ("WEMET"), (collectively "the police"), executed a federal "anticipatory search warrant" at the home / law office / recording studio of well-known musician and local attorney Robert L. Baldori ("Baldori"), at 2719 East Mt. Hope Road, Okemos, Michigan. Present in the premises at the time of the police raid were Baldori and his girlfriend,

Kelly Boyle ("Boyle")[1], of the same address, and Petitioner - Defendant, Joseph Emile Sissler ("Sissler"), a resident of Virginia.

Although the police had no information about Sissler and did not even know his identity prior to the raid, he was searched, interrogated, arrested, taken to jail, and charged in federal court that very same day. In contrast, Baldori, who was the target of the investigation, was not arrested, Mirandized, nor charged with any crime that night. Thirty-one days after the raid on his premises, the Ingham County Prosecutor's Office ("ICPO") issued three state felony marijuana charges against Baldori. No federal charges were ever brought against Baldori.

On January 12, 1990, FBI Agent Dennis Langkos, with the assistance of assistant United States Attorney, John Bruha, prepared an affidavit and application for a search

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[1]Ms. Boyle, who was alone in her bedroom at the time of raid, was not involved in any criminal activity.

warrant, and an anticipatory search warrant, which was authorized by the federal Magistrate. (App. J). The affidavit consists almost entirely of unsupported, unreliable, and uncorroborated hearsay from James Joseph ("Joseph"), an informant and convicted felon who was under enormous pressure to target and set-up Baldori pursuant to a plea and sentence agreement.[2] Although this was a federal anticipatory search warrant, no marijuana had been obtained for this reverse transaction until three days after the warrant had been

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[2]Lankgos' affidavit for the search warrant avers that Joseph told him that he sold Baldori marijuana on four occasions in 1989, the first alleged transaction occurring in April or May, 1989. The affidavit fails to indicate the date of any other transaction. (App. J) Thus, within the four corners of the affidavit, there is no indication that Joseph sold marijuana to Baldori after May, 1989, 8 months prior to the issuance of the anticipatory search warrant. Langkos admits that neither he nor anyone else made the slightest attempt to verify any of the information provided by Joseph. (App. K).

issued.[3] None of the two dozen law enforcement officers involved in the raid had previously participated in obtaining or executing an anticipatory search warrant. None of the executing police officers had read nor been given a copy of the search warrant or its supporting affidavit, nor did any of them know what items were "particularly" described or what items could be seized under its terms. (App. L, pp. 15-16, 130, 159-160). The police officers admitted, upon reviewing the search warrant after its execution, that they were unable to determine its time limitations. (App. M, pp. 145, 163-164, 170-171, 222, 226, 344). The search warrant was drafted by Lankgos and AUSA Bruha intending that it not restrict the seizure of documents to any time-frame. To justify the seizure of thousands of

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[3]On January 11 or 12, 1990, Metro Lt. Whitford had merely "inquired" about the possibility of obtaining 160 pounds of government-owned marijuana, as reflected in ¶13 of the affidavit. (App. J, ¶ 13).

documents dating back as far as 1969, AUSA Bruha argued to the district court that the police were not limited in their search by any time periods relating to documents because the search warrant contained no such time limitations. (App. N, pp. 3-5). Members of the IRS and the ICPO's Asset Seizure Unit also admitted that they "piggy-backed" the federal "anticipatory search warrant" because they did not have independent probable cause to obtain their own search warrants. (App. M, pp. 14, 65-66, 199).

To appreciate just how general, massive, unrestricted, and illegal the search and seizure was, one need only review the inventories reluctantly prepared by the ICPO a year after the search only after ordered to do so by Judge Houk. (App. O).

The police seized thousands of documents, including the corporate records of several businesses in which Baldori and/or Boyle had ownership interest and all of Baldori's

computer equipment and disks.[4] Although all of Baldori's 500 computer disks were seized, most of which were clearly labelled as commercial software, attorney-client files, and law school outlines, the police failed to ever retain an expert to read the disks, sort out what may be important to the police, and return to Baldori and Ms Boyle those documents and disks important to their livelihood and personal life.

Particularly outrageous is the theft by the police of personal and intimate (nude) photographs and color slides of Ms Boyle,

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[4]Among the documents seized were Baldori's canceled checks dating back to 1969, attorney-client material, movie and concert ticket stubs, cartoons, recipes, magazines, corporate records of several businesses, and many other items beyond the scope of the warrant. Det. Early testified he seized documents to determine Baldori's "net worth." (App. M, pp. 28, 50, 81). Nothing in the search warrant authorizes the seizure of such documents and, in fact, Agent Healey testified that "we weren't looking for records for net worth." (App. M, p. 257).

which she kept in a box under her bed.[5] The police entertained themselves with a slide show of the nude photographs and slides at the police station. For five months following the raid, the police engaged in a "conspiracy of silence" about these thefts and professional misconduct.[6] This evolved into a "cover-

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[5]Officer Diebolt improperly removed nude photographs from a prior and unrelated search warrant scene, for which he received only a verbal reprimand. (App. M, pp. 310-311).

[6]Only after one of the police officers admitted at his deposition to being at the slide show was there a request by Metro Squad command to the subordinate officers for a return of the stolen photographs and slides. Even then, however, there was no attempt to investigate the theft, or to discipline or charge the officers who stole the photographs and slides. On July 11, 1990, Metro Lt. Whitford, at a staff meeting, requested that the police officers return the photographs and slides with "no questions asked." (App. P). Lt. Whitford advised the officers that they could lose court cases such as this one because of this behavior. (App. Q).

up."[7] A token criminal investigation of the Metro officers was finally by Ingham County Prosecutor, Donald Martin ("Martin"), and conducted by Captain Rapp, the executive director of Metro. Although Judge Houk ordered that all of the criminal investigation reports be turned over to undersigned counsel no later than October 31, 1990, not surprisingly, the government failed to turn over the only incriminating report.[8]

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[7]Although every police officer deposed testified that they had seen the photographs and slides of Ms. Boyle at the police station, not one could "recall" who stole them, had possession of them, on whose desks they had seen them, or who ran the slide projector, and most could not "recall" the names of any other officer who was present for the "stag show." Although Lt. Patrick and Agent Langkos were identified as being present at the slide show, both denied being present. Even two assistant prosecutors, one who was shown a photograph and the other who was offered to be shown a photograph, could not recall who was involved. (App. R).

[8]On September 23, 1990, Dep. Tim Doerr, who was not a Metro Squad officer, notified Lt. Patrick that Metro Off. Diebolt came to Doerr's residence and showed him a box of slides of Ms. Boyle.

The basis for the "anticipatory search warrant" was a "reverse drug transaction" in which the police used a convicted felon motivated by a sweetheart plea and sentence bargain, to "target" and "set-up" Baldori, his attorney and friend of twenty-three years, by delivering to him government-owned marijuana.[9] The police clearly violated most of the substantive provisions of their own policies regarding reverse drug transactions, executing search warrants, tagging and cataloguing of evidence, and the use of confidential informants.[10] The blatant violation of their

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This information was contained in several police reports that were withheld from the defense long after they were available. (App. S).

[9]Although Joseph had been told that he faced up to a forty-year sentence without this agreement, he received a sentence of only one-year work release. Joseph had previously been convicted of a marijuana felony in Florida and served his sentence in a Florida penitentiary.

[10]This was a joint Metro and FBI operation governed by the policies and guidelines of Metro, including the "Policy Governing 'Reverse Drug

Transactions.'" (App. T). The Policy defines a reverse drug transaction "as the offering for sale of a controlled substance by an undercover police officer in the performance of his/her duty for the purpose of furthering a criminal investigation."

The Policy expressly requires that only experienced police officer from a departmental work unit may act as a "seller." In blatant violation of the Policy, the government used a civilian, Joseph, to act as the seller. The Policy requires that every attempt be made to eliminate the confidential informant from the actual reverse transaction; however, no effort was made to eliminate Joseph.

The Policy requires that the drugs shall never be out of the immediate control of the undercover officer; however, the marijuana left the immediate control of the police from the time it was placed in the trunk of Joseph's car until the search warrant was executed 2 1/2 hours later. The contraband was even out of Joseph's control for 1/2 hour after he left the Baldori premises.

The Policy requires that the operation shall be concluded and the defendant(s) arrested as soon as all of the elements of the anticipated crime has been satisfied. The police violated this policy in at least two respects. First, all of the elements of the anticipated and alleged charges were satisfied upon Joseph delivering the police-owned marijuana to Baldori's premises, yet, they waited two hours before executing the search warrant. Second, the police

own policies is further evidence of the pattern of bad faith, outrageous, and egregious conduct on the part of the police. The actions of the police towards their own confidential informant can be construed as nothing less than an attempt to obstruct

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violated the terms of the anticipatory search warrant. The Magistrate specifically "commanded" the police to execute the search warrant "upon delivery of the marijuana" to the premises, not two hours after delivery of the marijuana. (App. J). Second, Baldori was not arrested until a month after the raid.

The Policy requires that all personnel, including officers from other agencies, be apprised of the Policy and agree to comply with it; however, neither the FBI nor the IRS, nor for that matter, most of the Metro officers, were apprised of the Policy.

The government violated numerous other policies: 1) No attempt was made to verify any of the information obtained from Joseph, a confidential informant and request approval from the local prosecutor (App. U); 2) Failure to have a uniformed officer assigned to the raid (App. U); and, 3) Failure to properly tag, catalogue, and inventory property seized, and otherwise maintain an appropriate chain of evidence. (App. M, p. 271, 274-275, 281, 283, 287, 292, 334).

justice.[11] On January 4, 1991, when undersigned counsel attempted to depose two police officers about the theft of property from the Baldori premises, they invoked their Fifth Amendment rights against self-incrimination. (App. X). On March 19, 1991,

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[11]On October 21, 1990, undersigned took a sworn statement of the confidential informant, Joseph, who testified that Lt. Whitford informed him within days following the execution of the search warrant that the police had removed Ms. Boyle's personal and intimate photographs from the premises. Joseph testified that FBI Agent Langkos showed him, in the Lansing FBI office, a stack of what Langkos represented were some of Ms. Boyle's personal and intimate photographs. (App. V). Whitford and Langkos have both denied Joseph's accusations. If Joseph's testimony is true, then Whitford and Langkos committed perjury. Langkos admitted that he was informed by Whitford of Joseph's accusations and then went with Whitford to Grand Rapids specifically to talk to Joseph about his accusations. Langkos had no legitimate purpose for seeing Joseph at that time. Langkos admitted that, even though he argued with Joseph, Joseph refused to change his story. (App. M, pp. 363-366). On December 19, 1990, Judge Houk, issued a Temporary Restraining Order against, inter alia, Whitford and Langkos restraining them from further communication with Joseph. (App. W).

Chief Evidence Officer Daniel Zolnai and Officer Les Diebolt invoked their Fifth Amendment rights and refused to testify at the reopened suppression hearing. (App. N, pp. 16-18) Officer Luciano invoked his Fifth Amendment right and refused to testify about the execution of the search warrant and alleged thefts by the police when called by Sissler; however, he conveniently testified when called by the government at the suppression hearing.[12]

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[12]Luciano was a necessary witness in order for the government to introduce a videotape of the search into evidence. Since Luciano denied any knowledge or culpability regarding the property alleged to have been stolen from the Baldori premises, it must be assumed that he was either lying at the March 19, 1991 hearing or his earlier refusal to testify when called by Defendant was an attempt by him to obstruct Defendant's right to discover the facts surrounding the execution of the search warrant.

ARGUMENT

I. THE SIXTH CIRCUIT INCORRECTLY FOUND THAT SISSLER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT WHERE POLICE OFFICER WITNESSES, INCLUDING THE CHIEF EVIDENCE OFFICER, EXERCISED THEIR FIFTH AMENDMENT RIGHTS AT A SUPPRESSION HEARING.

The Sixth Circuit incorrectly found that Sissler was not denied his Sixth Amendment right where police officer witnesses, including the chief evidence officer, exercised their Fifth Amendment rights at a suppression hearing. The district judge reopened the suppression hearing specifically to allow inquiry into "the good faith of the police officers and the question of whether or not other items beyond the scope of the search warrant were seized in flagrant disregard for the limitations set forth in the search warrant." (App. F, p. 4). Defendant was denied the right to confront the crucial witnesses on these issues. The key police officers who executed the search warrant, including the chief evidence officer who was

responsible for seizing the evidence, invoked their Fifth Amendment rights and refused to testify as to the search and seizure of evidence.[13]

It is not disputed that Sissler has a Confrontation Clause right without regard to who calls the witness, Chambers v Mississippi, 401 U.S. 284, 298 (1973), and it cannot be plausibly maintained that the police officer witnesses were not witnesses against Sissler.

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[13]These officers had good reason to exercise their Fifth Amendment Rights. That same month criminal charges were issued against them by the Ingham County Prosecutor in connection with their execution of this search warrant. (App. Y). The facts underlying the criminal charges against the two officers could be determinative of the very issues for which the suppression hearing was reopened. At issue was the reasonableness and good faith of the police officers who executed the search warrant. Without the ability to question Officers Zolnai and Diebolt, Defendant and the district court were effectively denied the ability to conduct a proper fact finding into these issues. Consequently, the district court improperly afforded the benefit of any and all doubt on these issues to the police officers who had been charged criminally with illegally executing the search warrant.

The very evidence seized by these witnesses is the essence of the government's case against Sissler.

> Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [citation omitted.] But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. [citation omitted.]

Chambers, at 295.

The U.S. Supreme Court has specifically held that the fundamental protections of confrontation and cross-examination are rooted in the right of an individual to be presented with the government's evidence and the opportunity to defend against it. Greene v. McElroy, 360 U.S. 474, 496 (1959). It also is well-established that where there is a conflict between a defendant's Sixth Amendment right to confrontation and a witness' Fifth Amendment right to refuse to testify, such a

conflict must be resolved in favor of the defendant because of the inherent danger of substantial prejudice.

> When a witness legitimately invokes his fifth amendment privilege, creating a potential conflict with a defendant's sixth amendment right to confrontation, the relevant question on review is "whether defendant's inability to make the inquiry creates a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony."

United States v. Kimble, 719 F.2d 1253, 1257 (5th Cir. 1983)(quoting Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967)).

The district court conceded that at least one of these police officers called by Sissler played a "crucial role" in the "execution of the search warrant."[14] (App. C, p. 11). In

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[14]However, the district court incorrectly stated that only one police officer invoked his Fifth Amendment privilege. The record clearly reflects that two police officers, Chief Evidence Officer Zolnai and Officer Diebolt, both invoked their Fifth Amendment rights and refused to testify at the suppression hearing. Officer Magnus, who interrogated Defendant, and Officer Luciano invoked

a puzzling twist, the court ruled that the officers' refusal to testify did not violate Sissler's Sixth Amendment right because "otherwise, defendants could simply manufacture violations of the Confrontation Clause by calling witnesses who they know will invoke their Fifth Amendment rights and calling them crucial to their defense." (App. C, pp. 11-12). Stepping even further afield of recognized constitutional doctrine, the court concluded that it was "inappropriate" and "unethical for the defense to call a witness it knows will assert a Fifth Amendment right. . .." (App. C. p. 12).

The district court reversed the presumption in favor of the right to confrontation articulated in Kimble, supra. The witnesses in question are neither ordinary nor peripheral witnesses. Their testimony would not have been cumulative nor directed at

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their Fifth Amendment rights and refused to testify at their deposition.

ancillary issues. These witnesses are the very police officers who executed the search warrant and seized the evidence at issue. Indeed, one of the police officers who invoked his Fifth Amendment privilege at the suppression hearing was the chief evidence officer, responsible for seizing, tagging, cataloguing, securing, and maintaining the evidence, and writing the principal police report. Officer Diebolt participated in the search and seizure operation. Officer Magnus was one of the two police officers who interrogated Defendant and also assisted in the execution of the search warrant. Thus, these witnesses were not, as the district court intimated, merely "witness[es] associated with the Government," but they were essential witnesses Defendant needed for demonstrating the lack of "good faith" in the execution of the search warrant, and they were essential witnesses for the Government to prove its case at trial.

The 6th Circuit cites Pennsylvania v Ritchie, 480 U.S. 39, 52 (1987) for the proposition that the right of confrontation is a trial right. But the Ritchie court also said:

> It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." [citations omitted].

Ritchie, at 57. Here, the government, by virtue of its police officer witnesses refusing to testify, withheld exculpatory evidence from Sissler.

Relying on United States v Moore, 954 F.2d 379 381 (6th Cir. 1992) and McCray v Illinois, 386 U.S. 300, 314 (1967), the 6th Circuit held that the government need not produce all witnesses competent to testify, nor are the government witnesses compelled to waive testimonial privileges. Moore and McCray are cases where the defendant attempted to discover the identification of a

confidential informant. That is not the situation here.

The right to confrontation would be hollow indeed if the government could nullify Sissler's Sixth Amendment right by their police witnesses, who gathered the evidence upon which their case is base, hiding behind the Fifth Amendment. The police officers' testimony was critical to Sissler's Motion to Suppress. The district court explained that the "good faith" of the police officers who executed the search warrant was the core issue for determination at the reopened suppression hearing.[15] The burden of proof shifts to the government to establish that the police were entitled to the benefit of the "good faith" exception once Sissler demonstrates that the

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[15]By issuing the criminal charges against Zolnai and Diebolt, the Ingham County Prosecutor and the Magistrate already determined that there is "reasonable cause" to believe that these police officers "wilfully exceeded the authority granted by the search warrant." See Mich. Comp. Laws 764.1(1) and Mich. Comp. Laws 764.1a(1). (App. Z).

police exceeded the scope of the search warrant. The testimony of officers Zolnai and Diebolt were essential to negate the government's claim of good faith.[16] With the officers' testimony, Sissler would have defeated the government claim of entitlement to the "good faith" exception and would have demonstrated that these officers, particularly the chief evidence officer, acted in bad faith by committing such crimes as larceny during the course of the search warrant execution.

It is important to note that Sissler entered a conditional plea preserving the pretrial legal issues, which were inappropriate to bring before a jury. Therefore, the suppression hearing was

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[16]Sissler's inability to confront the chief evidence officer, as well as the other officers, was especially problematic since there was absolutely no documentation identifying which officer seized any particular item. (App. M, p. 74). Unless an officer actually "recalled" seizing a particular item, the district court precluded the defense from asking questions concerning that item or why it was seized.

Sissler's one opportunity to examine the relevant police witnesses to establish the facts necessary for the court to determine the issue of flagrancy.

When the police invoked their Fifth Amendment rights, thereby depriving Sissler of his right to confront, cross-examine, and satisfy the test for quashing the warrant and suppressing the evidence, Sissler's constitutional rights were plainly violated and the case against him must be dismissed. When the confrontation clause is violated, the court must consider whether the error is harmless beyond a reasonable doubt. Stevens v. Bordenkircher, 746 F.2d 342, 347 (6th Cir. 1984). Here, as in Stevens, that test cannot be satisfied.

> In our view, failure to permit cross-examination of a key government witness concerning bias, prejudice or motive cannot be construed reasonably as harmless error.

Id. A fortiori, when a defendant is denied the ability to confront and question under

oath the police officers who are critical both to his defense and the government's case, the case cannot be maintained against that defendant within the bounds of the Constitution. See also Davis v Alaska, 415 U.S. 308, 318 (1974) (Denial of "the right of effective cross-examination . . . 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'").

II. THE SIXTH CIRCUIT INCORRECTLY FOUND THAT THE ANTICIPATORY SEARCH WARRANT SATISFIED BOTH THE SURE COURSE AND PROBABLE CAUSE STANDARDS WHERE THE CONTRABAND WAS NOT IN THE CONTROL OF THE POLICE AND THE "PROBABLE CAUSE" WAS BASED ON NUMEROUS CONTINGENCIES.

The Sixth Circuit, based on an inaccurate assumption, incorrectly found that the "anticipatory" search warrant satisfied both the "sure course" and "probable cause" standards. (App. A, p. 7). The Sixth Circuit concluded that, "At the time the warrant was issued, the police controlled the marijuana that was eventually delivered to Baldori.

Joseph, an informant, working for the government, had arranged to deliver it to Baldori's home on January 15." (App. A, p. 7). This conclusion is not true.

The undisputed facts are that Lt. Whitford attempted to make arrangements with WEMET, a separate police agency not involved in this case, to obtain 160 pounds of marijuana for use in this reverse drug transaction. However, no marijuana was obtained from WEMET until three (3) days after the search warrant was authorized. Additionally, Metro was only able to obtain only 88 pounds, not 160 pounds.

The anticipated transaction between Joseph and Baldori was contingent upon a number of factors, including, inter alia, 1) Metro obtaining marijuana from WEMET; 2) Joseph's continued cooperation; 3) Baldori agreeing to meet with Joseph; 4) Sissler agreeing to purchase the marijuana; and 5) Sissler's ability to raise the money. If each

of these contingencies were not met, then the anticipated transaction would not occur. There was no probable cause, just speculation, that the anticipated transaction would occur.

The prevailing view is that contraband must be "on a sure course to its destination." United States v Garcia, 882 F.2d 699 (2d Cir.), cert. denied, 493 U.S. 943 (1989). The Sixth Circuit incorrectly relies on Garcia and United States v Lowe, 575 F.2d 1193 (6th Cir.), cert. denied, 439 U.S. 869 (1978) for a probable cause standard to review an "anticipatory" search warrant. "The determining factor in Garcia, Dornhoffer, and the other cases cited therein, is whether the contraband "is on a sure course to its destination. 882 F.2d at 702; 859 F.2d at 1198; (citations omitted)." United States v Upton, 763 F.Supp. 232, 239 (S.D. Ohio 1991).

In Garcia, the search warrant was obtained after 1) the couriers agreed to cooperate, 2) the contraband was in their

possession, and 3) specific arrangements were made with defendant for delivery. There were no contingencies other than obtaining the search warrant. Lowe, is a "mail" case, and, therefore, probable cause was based on the fact that the package was "on a sure course to its destination."

The Sixth Circuit incorrectly relies on United States v Hendricks, 743 F.2d 653 (9th Cir. 1984), cert. denied, 470 U.S. 1006 (1985). The Hendricks' court also required probable cause that the contraband be on a sure course to its destination. Id, at 655. Where there are contingencies left to chance or the discretion of the police, no probable cause exists. In Hendricks, no arrangements had yet been made for delivery of the contraband to the defendant; in contrast to Garcia, where arrangements had been made prior to obtaining the search warrant. Here, there were, at most, only tentative arrangements dependent on a variety of contingencies, which

do not add up to probable cause; moreover, the contraband was not a sure course to its destination since Metro did not even have possession of the marijuana at the time the search warrant was issued.

III. THE SIXTH CIRCUIT, FINDING THAT SISSLER HAS STANDING AND THAT THE POLICE ENGAGED IN EGREGIOUS POLICE MISCONDUCT, IMPROPERLY FAILED TO QUASH THE SEARCH AND SUPPRESS THE EVIDENCE.

The Sixth Circuit side stepped established precedent in order to uphold this search. A search warrant executed in flagrant disregard of the limitations of the search warrant requires suppression of **all** of the evidence. United States v Henson, 848 F.2d 1374, 1383 (6th Cir. 1988), cert. denied, 109 S.Ct. 784 (1989); United States v Medlin, 842 F.2d 1194, 1199 (10th Cir. 1988) ("Medlin II"); United States v Lambert, 771 F.2d 83, cert. denied, 474 U.S. 1034, (6th Cir. 1985); United States v Heldt, 688 F.2d 1238, 1239 (D.C. Cir. 1981), cert. denied sub nom. Hubbard v United States, 456 U.S. 926 (1982);

and United States v Rettig, 589 F.2d 418, 423 (9th Cir. 1978).

> **When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant.**
> ....
> The government overlooks the fact that the objective reasonableness exception to the exclusionary rule set forth in Leon is available only in those cases in which the officers act objectively reasonable in executing a search warrant which is subsequently found to be invalid.

Medlin II, at 1199 (emphasis added).

In finding that the police seized numerous items outside the scope of the search warrant, the Sixth Circuit explained that **"We agree that the record establishes that some of the officers apparently engaged in egregious misconduct while searching the Baldori home."** (App. A, p. 15) (emphasis added). The Sixth Circuit also found, without expressly stating,

that the police acted in "flagrant disregard" of the limiting terms of the search warrant:

> The search warrant return indicates that the officers seized three computers, two printers, a modem, a fax machine, and several disk drives. **The language of the search warrant does not appear to support the seizure of any of these items.**
>
> Second, the officers seized $1,030 in Canadian currency. . . . **The warrant authorized the seizure of only U.S.** currency.
>
> * * *
>
> Detective Early testified that most of the records he seized, some dating back to 1969, were taken in an attempt to establish Baldori's net worth. The warrant did authorize seizure of records showing purchases made with marijuana proceeds, but did not authorize the officers to seize all of Baldori's financial records to establish his net worth. **The intentional seizure of those documents goes far beyond the terms of the warrant.**
>
> Fourth, the officers seized more than 30 intimate photographs and slides of Boyle. **The government concedes that the photos and slides are not covered by the warrant.** * * * Two officers

> have been charged in state court with illegally taking items during the search.

(App. A, pp. 12-15) (emphasis added).

Clearly, Sissler, as an overnight guest, has an expectation of privacy, and, therefore, the same Fourth Amendment protections as his host in the Baldori home. Minnesota v Olson, 495 U.S. 91 (1990); United States v Osorio, 949 F.2d 38, 41 (2d Cir. 1991). The Sixth Circuit attempts to limit the scope of Sissler's "standing" to challenge the search.

> Unlike the defendants in Medlin and Rettig, however, **Sissler's rights were not violated by the misconduct**. All of the property seized from him was within the scope of the warrant. **Thus, even if we were to find that the officers searched Baldori's home in flagrant disregard of the warrant's scope, we would find that the officers did not violate Sissler's rights.** We believe that deterrence would not be served by allowing Sissler to benefit from the alleged violation of Baldori's and boyle's Fourth Amendment rights. Cf. Medlin, 842 F.2d at 1200.

(App. A, p. 15) (emphasis added).

Sissler either has or does not have

standing, but not partial standing. Osorio does not distinguish, as the Sixth Circuit attempts to do, between property belonging to the defendant's host or the defendant. In Osorio, defendant Castro was the overnight guest of his host, Osorio. Castro successfully challenged the search of Osorio's premises. In suppressing the search, the 2d Circuit found that, **"Castro concedes that he had no property or possessory interest in the items seized."** Osorio, at 40 (emphasis added). The court's determination was based on expectation of privacy, and found that where a defendant is an overnight guest, that defendant does have an expectation of privacy, and, therefore, standing to challenge the search, not merely part of the search. Osorio, at 42.

Additionally, the Sixth Circuit's attempt to distinguish Medlin and Rettig, both of which suppressed all the evidence based on a search exceeding the intended scope of the

warrant, are misplaced. In Rettig, the police obtained a state search warrant based on an affidavit that failed to disclose the earlier denial of a federal search warrant and failed to disclose the real purpose of the search warrant. Rettig, at 421. The function of the judge reviewing an application and issuing a search warrant is lost if the police fail to disclose all the material facts.

> By failing to advise the judge of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant.

Rettig, at 422.

> A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyond that set forth in the affidavits.

Rettig, at 423.

Here, the police did not disclose all the material facts or the real purpose of the search and its intended scope to the magistrate issuing this search warrant, including, inter alia, that the local Asset Seizure Unit and the I.R.S. intended to "piggy-back" this federal search warrant in order to search for and seize property for which they had no probable cause and could not obtain their own search warrant. The Sixth Circuit correctly found that the execution of this search warrant intentionally went far beyond the scope of the search warrant.

> We find the record establishes that the agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions. As interpreted and executed by the agents, this warrant became an instrument for conducting a general search.

Rettig, at 423. The police in this case obtained a search warrant from the federal magistrate intentionally and deceptively

failing to disclose their intended and scope and purpose. The police, then used the search warrant merely as a key to enter the Baldori premises and proceed to conduct a general search.

The Medlin court was clear that the Federal authorities had the obligation of monitoring and supervising the activities of the invited agencies during the execution of the federal search warrant.

> The ATF agents could have decided not to bring Deputy Carter along as an assistant on their search, but having exercised their prerogative to do so **the ATF agents could have, and should have, monitored Carter's activities to ensure that the federal search was not tainted by an unrelated "fishing expedition."**

Medlin, at 1200 (emphasis added). As a result of this search, which flagrantly exceeded the scope of the federal warrant, requires the suppression of all evidence seized under the warrant.

> . . . even **evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant**

> **exhibit "flagrant disregard" for its terms.**
>
> * * *
>
> When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and **a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under the warrant.**

Medlin, at 1999 (emphasis added).

The Sixth Circuit incorrectly found that Sissler's Fourth Amendment rights were not violated since his property was within the scope of the warrant. Sissler's standing entitled him to challenge the search. Since the police failed to disclose material facts and the intended scope and purpose of the search, and since the police intentionally seized property far beyond the scope of the warrant, all the property must be suppressed.

> Unfortunately, the ATF agents' failure to prevent the flagrant disregard for the terms of their search warrant, a failure for which they are accountable, **renders all the fruits of the firearms search**

inadmissible in evidence against Medlin.

Medlin at 1200 (emphasis added).

IV. THE SIXTH CIRCUIT, BASED ON AN INCORRECT ASSUMPTION OF FACTS, ERRED IN FINDING THAT SISSLER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED

The Sixth Circuit incorrectly found that Sissler ". . . concedes * * * that he agreed to talk with the officers before he made the incriminating statements." (App. A, p. 15). The circumstances of Sissler's interrogation were unique. Sissler was interrogated in the recording studio while Baldori, his friend and attorney, was being interrogated a few feet away in a glass enclosed, sound-proof control booth within Sissler's view. Sissler was advised of his Miranda rights while observing his attorney talking to the police, not knowing that Baldori was intentionally not advised of his Miranda rights and was refused his repeated requests to call an attorney.

Although the case of United States v. Jones, 641 F.2d 425 (6th Cir. 1981), involved

the issue of a valid consent to search, the Sixth Circuit focused on whether "the consent was uncontaminated by duress, coercion, or trickery." Id, at 429. The court held that "the only credible inference [is that the consent to search] was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." Id. The court noted that there were several "police officers at the scene, all of them armed, two with shotguns drawn and others with pistols drawn." Id. Similarly, in United States v. Talkington, 843 F.2d 1041 (7th Cir. 1988), another case involving a consensual search, the court noted that, as in the instant case, "[t]he district court apparently did not focus on many potentially coercive factors." Id. Although the issue before this Court is the consent to waive the right to counsel and to remain silent, not to a search, the reasoning should be the same. The coercive factors imposed on Sissler were,

essentially, ignored by the district court and the Sixth Circuit.

Sissler maintains that, prior to waiving his Miranda rights, he inquired whether he should have an attorney. The police responded by indicating that would never have another opportunity to help himself as he did at that moment, in an effort to trick him into waiving his rights. Several courts have held that similar inquiries are an equivocal assertion of a defendant's right to cut-off questioning and have counsel.

The Eleventh Circuit held in Towne v. Dugger, 899 F.2d 1104 (1990) held that the defendant's question to the officer, "Officer, what do you think about whether I should get a lawyer?" was an equivocal request for an attorney and the officers had a duty to clarify that issue prior to continuing questioning. In Towne, the defendant stated he made a request for an attorney, but was told by the officers that if he went that route,

"he would throw the book at him." Towne, at 1105.

In Owen v. Alabama, 849 F.2d 536 (11th Circuit 1988), the court held that "I think I'll let y'all appoint me one" was an equivocal request for counsel. In Owen v. State, So. 2d; 46 Cr.L. 1536 (1990), the defendant was freely confessing to several murders. In response to a question later in the interview, the defendant stated, "I'd rather not talk about it." The officers merely continued questioning as to other topics. The court held that the defendant made at least an equivocal assertion of his right to cut-off questioning and advised:

> Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up . . . It was error for the police to urge appellant to continue his statement.

The concurring opinion goes on to state:

> Later, in Michigan v. Mosley, 423 U.S. 96, 104 (1975), the Court stated that an individual's right to cut off questioning must be "scrupulously honored". Here, it was not. [Owen, 46 Cr.L. at 1537]

These statements under the reasoning of the 11th Circuit in Towne, supra, and the Florida Supreme Court in Owen, supra, and Michigan v. Mosley, supra, were equivocal assertions of the right to an attorney and right to silence. Sissler's statements, therefore, should be suppressed and ruled inadmissible.

REASONS FOR GRANTING THE WRIT

This Court should grant Certiorari in order to determine an important question of law as to whether a defendant's Sixth Amendment right should prevail over the Fifth Amendment rights of the chief evidence officer and other police witnesses at a pretrial suppression hearing.

This Court should also grant Certiorari to determine an important question of law as

to whether an "anticipatory" search warrant is valid where the contraband that is neither "on a sure course to its destination " or even in the control of the police involved, and where the probable cause is based on a series of contingencies outside the control of the police.

This Court should also grant Certiorari to determine an important question of law as to whether the evidence seized as a result of a search executed in flagrant and egregious disregard of the limiting terms of the federal warrant should be suppressed, especially where the police failed to disclose material facts and their intended scope and purpose of the search to the issuing magistrate.

This Court should also grant Certiorari to determine an important question of law as to whether a defendant's Fifth Amendment Rights are violated when (s)he is interrogated within view of his co-defendant attorney talking to the police not knowing that the

police intentionally failed to advise him of his Miranda rights, and where the police response to a defendant's inquiry of whether (s)he should have an attorney was that (s)he would never be in a better position to help yourself.

CONCLUSION

> It is sometimes said that error "crept" into the trial of a lawsuit. Not so in the case at bar. It marched in like an army, with banners, and trumpets.

State v. Tolson, 248 Iowa 733, 82 N.W.2d 105 (1957).

The record in this case presents a full spectrum of police abuse and misconduct and implicates virtually every principle underlying the Fourth, Fifth, and Sixth Amendments. If ever a case cried out for a judicial statement to the police that flagrant and egregious disregard for a search warrant's limitations will not be excused, this is that

case.[17]

WHEREFORE, for the above and foregoing reasons, Petitioner respectfully requests that this Honorable Court issue its writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

REID AND REID
Attorneys for Petitioner

Dated: 10/21/92

Stuart R. Shafer (P25599)
One Business & Trade Center
200 Washington Square, North
Lansing, Michigan 48933-1384
(517) 487-6566

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[17] As Justice Holmes explained in Dodge v. United States, 272 U.S. 530, 532 (1926), "[i]f the search and seizure are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used."